3 1761 10631503 9
BORA LASKIN LAW LIBRARY

Digitized by the Internet Archive
in 2018 with funding from
University of Toronto

https://archive.org/details/casesmaterialson00schi

CASES AND MATERIALS ON THE LAW OF EVIDENCE

PART A: A BASIC PROCEDURAL CONSIDERATION:

THE ADVERSARY TRIAL SYSTEM

CHAPTER I : INTRODUCTION

FINAL REPORT OF THE COMMITTEE ON SUPREME COURT PRACTICE AND PROCEDURE

(Presented by the Lord High Chancellor to Parliament, 1953) pages 84-86:

There are some who have suggested or asserted that the English rules of evidence are the chief or at least one of the chief obstacles to a reduction in the costs of litigation, and that, could we devise some far-reaching amendments or codification of these rules, we should be at least half way to our goal. To take but one illustration: there is, as is well known, a considerable body of law relating to the admissibility of evidence, of which the rules relating to "hearsay" are an important part. This body of law is largely peculiar to the English system of law, having no true counterpart in the Continental systems. It owes much of its origin, no doubt, to the practice of trials by jury and the necessity or desirability of protecting unskilled jurymen from the risk of being misled by a type of "evidence" which, though convincing on the face of it, has or should have very little weight attached to it. It has therefore been suggested that these rules as to the admissibility of evidence are now largely anachronistic and could with advantage be swept away. Further, the emphasis which under our system has been placed upon the sworn testimony of witnesses in the witness box should be qualified today by the fact that, as one witness stressed before us, the sanctity of the oath has lost much of its force. A witness in 1953 is no longer so impressed with the fear that if he swears falsely he will go to hell, as were his father or grandfather before him; prosecutions for perjury are rarely undertaken.

In the circumstances we embarked with some optimism upon our enquiry into the rules of evidence. Unfortunately, we have been in large measure disappointed. We have to confess that we have not in the course of our journey picked up the magic key to the door of cheaper litigation.

General conclusions

Our investigations have, in the natural course, fallen under two main heads, vis.:

(a) an enquiry into the law or rules of evidence applicable in Continental systems of law with a view to comparison and to seeing whether or to what extent such law or rules could be usefully adopted in England;

(b) an enquiry into the English law and rules of evidence in order to discover what relaxations or amendments should be made therein, on the assumption that, generally, the English law and rules ought to be maintained.

As will appear, we have felt compelled to conclude that the results of enquiry (a) are substantially negative, and, accordingly, that the most useful reforms must consist of amendments to our existing practice. It necessarily follows that the benefits to be derived from such amendments are of limited character.

In the circumstances we think it desirable to explain somewhat fully our reasons for the general conclusions stated in the preceding paragraph.

(a) There is no doubt that the difference between the English and the Continental systems in regard to evidence, i.e. in regard to the rules of evidence and the way in which evidence is taken, is very marked; and equally there is no doubt that the difference is one of the main reasons for the fact that litigation in England is substantially more costly than (for example) in France or Germany. We heard evidence of both the French and German systems. (The German practice is that now operating in Western Germany and substantially corresponds with the system prevailing before the "Nazi" régime.)

(b) In both France and Germany all (oral) witnesses are the Court's witnesses, though generally speaking they are tendered by the parties. In both countries the system is (as has been said), unlike the English system, "inquisitorial". There is substantially no cross-examination and for practical purposes none at all by the parties or their legal representatives. The witness in effect makes a deposition before the examining Judge who decides what witnesses shall be summoned. The process of taking evidence is almost invariably at an early stage of the proceedings, long before the "trial" proper.

(c) The witness makes his statement in his own words -- there being no "hearsay" rule. It is for the Court to decide the value of what has been said. It is, however, to be noted that the parties themselves are, generally, not competent witnesses in Germany; and in France parents, relatives and servants of the parties and certain other categories of persons are not competent.

(d) In both France and Germany, oral testimony is regarded as of far less significance than in England (as will be apparent from the preceding paragraph). The main emphasis is on written evidence including notarially attested records of every sort of transaction. This point is of the greatest significance and is later referred to.

(e) Types of action which are common in England and which depend, with us, par excellence, upon oral testimony either do not occur or are of far less importance in France and Germany. For example, in France the absence of any "exemplary damages" means that libel cases are rare; and in both France and Germany, owing largely to the doctrine of risque créé, personal injuries actions are far less common.

We considered carefully whether it would be right to recommend the adoption in England wholly or in part of the Continental practice in regard to evidence, but we have come to a conclusion against so doing. In the first place, to do so would obviously strike at the root of the English ideas of the administration of justice. There are no doubt two views on the question which system is better adapted to elicit the truth. . . . It is of the essence of the English system (enshrined in such phrases as "an Englishman's word is his bond") that generally speaking (i.e., save where expressly provided to the contrary by some statute) no writing or other formality is required to prove a right. Under the system, therefore, the greatest weight and importance is attached to the oral testimony of the parties and their respective witnesses. A change to the Continental system would logically involve a shifting of this very characteristic emphasis. We do not think such a change could effectively be made unless the Continental system of the administration of justice were adopted in its entirety. The law and rules of evidence in

England are adapted to the English system of justice. Those in France and Germany are adapted to the French and German systems. They are not interchangeable. The adoption here of Continental rules and practice in regard to evidence would mean a new kind of judiciary with many hundreds of local examining magistrates. It would mean also (at any rate if the French model were followed) the creation of a system of notaries all over the country before whom every transaction of any significance would have to be recorded if it were to be legally enforceable in practice. . . .

CHAPTER 2

THE FRAME OF REFERENCE AT TRIAL: the pleadings, the information, the summons and the indictment

(a) Civil Cases

Supreme Court of Ontario Rules of Practice

Rule 246: After the close of the pleadings, any party may set the action down for trial.

Rule 248: (1) The party setting an action down for trial or for assessment of damages at the time shall file a record containing a certified copy of the pleadings and particulars and of any order containing directions respecting the trial.

(2) Such record shall contain the full style of cause, and shall show the date when the writ was issued, and shall give the names of the solicitors for the several parties, and shall show, if such be the case, that judgment has been signed or the pleadings have been noted closed against any parties in default.

Rule 188: Where an amendment is directed or allowed at the trial, it is not necessary to issue an order therefor, and the amendment, unless otherwise directed, shall be made at once on the record.

Rule 185: A proceeding shall not be defeated by any formal objection, but all necessary amendments shall be made, upon proper terms as to costs and otherwise, to secure the advancement of justice, the determining of the real matter in dispute, and the giving of judgment according to the very right and justice of the case.

[Where a particular issue is not pleaded (in the original pleadings, or by amendment before or at trial), but the parties nevertheless fight out the issue at trial by introducing evidence thereon, on appeal the pleadings will be treated as if duly amended to follow the course of the trial: Canadian - Dominion Leasing Corp. Ltd. v. Suburban Superdrug Ltd. (1966), 56 D.L.R. (2d) 43 (Alta. App. Div.)]

(b) Criminal cases

Criminal Code, S.C. 1953-54, chapter 51 (as amended), sections 439, 440, 441, 491-497, 499-503, 695-696, 701-704.